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No. 08-774

In the Supreme Court of the United States

Supreme Court, U.S.
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ASSOCIATED BUILDERS & CONTRACTORS, SAGINAW VALLEY AREA CHAPTER, ET AL,
Petitioner,

v

MICHIGAN DEPARTMENT OF LABOR AND ECONOMIC GROWTH, ET AL,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT MICHIGAN DEPARTMENT OF LABOR AND ECONOMIC GROWTH IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

In 1992, the district court enjoined two provisions of apprenticeship training and education in the Michigan Electrical Administration Act (MEAA), relying on then existing Supreme Court precedent. After a change in Supreme Court law, Respondent petitioned the district court to dissolve the injunction. The district court declined, but the court of appeals reversed, holding that Michigan's regulation of apprentices and apprenticeship training programs is an area of traditional State regulation and that there is insufficient evidence that Congress's "clear and manifest purpose" in enacting ERISA was to preempt such State regulations. The questions presented are:

I. Whether Michigan's apprenticeship and training and education laws are preempted by ERISA when they (1) have no "reference to" ERISA plans; (2) constitute an area of traditional state regulation, thus qualifying for the presumption against ERISA preemption; and (3) mandate health and safety regulations, which is a subject matter outside the areas that Congress intended ERISA to control exclusively.

II. Whether the court of appeals, in ruling that the district court did not abuse its discretion, properly applied the "flexible standard" in determining that Respondent filed its Fed. R. Civ. P. 60(b)(5) motion in a "reasonable time" where the controversy involved a matter of substantial public interest.

PARTIES TO THE PROCEEDING

Respondent agrees with Petitioners' summary of the parties.

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The opinion of the court of appeals (Pet. App. 1a-20a) is reported as *Associated Builders & Contrs. V. Mich. Dep't of Labor & Econ. Growth,* 543 F.3d 275 (6th Cir. Mich. 2008). The opinion of the United States District Court for the Eastern District of Michigan, Pet. App. 23a – 39a, is reported as *Associated Builders & Contrs. V. Mich. Dep't of Labor & Econ.Growth,* 2007 U.S. Dist. LEXIS 24541 (E.D. Mich. 2007).

JURISDICTION

Respondent Michigan Department of Labor and Economic Growth (Respondent or DLEG) agrees with Petitioners Associated Builders & Contractors, Saginaw Valley Area Chapter, et. al. (collectively Petitioners or ABC) jurisdictional statement.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant statutory provisions involved are set forth in Petitioners' Appendices C and D. Pet. App. 40a – 49a. The relevant federal court rule involved is Fed. R. Civ. P. 60(b) that provides:

(5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable.

INTRODUCTION

Responding to this Court's shift in analyzing Employee Retirement Income Security Act (ERISA)[1] preemption cases, Respondent asked the district court to

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[1] Employee Retirement Income Security Act. 29 U.S.C. § 1001, *et. seq.*

dissolve a 1992 injunction of two provisions of the Michigan Electrical Administration Act (MEAA) involving the training and education of apprentice electricians. These provisions require a one-to-one ratio between trained electricians and apprentice electricians at all work sites, Mich. Comp. Law § 338.883e(3), and establish an "equivalency requirement" requiring all apprentices to participate in an apprenticeship training program that is the equivalent to the requirements imposed by the U.S. Department of Labor Bureau of Apprenticeship and Training, Mich. Comp. Law § 338.833(2).

These provisions are not unlike numerous other licensing statutes that are designed to establish guidelines for various trades and professions. These statutes, which are enacted pursuant to the State's police powers, seek to protect the public safety by ensuring proper training and practice standards to prevent abuses and serve to protect both practitioners and consumers.

In 1992, the district court enjoined DLEG from enforcing these provisions on the grounds that ERISA preempted such statutes. The district court applied then existing governing law that ERISA preemption had a very broad reach and interpreted ERISA such that it preempted any State law that had a "connection with" or made any "reference to" an employee benefit plan.

In 1995, this Court first signaled a shift from broad application of ERISA preemption in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.,* [2] and later clarifying that shift

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[2] *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995).

in *California Division of Labor v. Dillingham.*[3] The result is a presumption against preemption for state laws in areas of traditional state regulation due to the concept that that a State's powers are not to be superseded by ERISA unless that was the "clear and manifest purpose" of Congress.

The court of appeals correctly held MEAA's regulation of apprentices and apprenticeship training programs was an area of traditional State regulation, and that Congress did not evidence a "clear and manifest purpose" to supersede or supplant traditional State regulation of health and safety laws in enacting ERISA.

The claimed conflict among the courts of appeals is insubstantial. This is due to the general uniformity among the circuits on the issue of ERISA, and the presumption against preemption in the context of state laws regulating safety and training standards for apprentices. The sole conflicting decision, which was specifically discussed by the court of appeals below, is a 2001 Eighth Circuit decision. But the nature and extent of any conflict is uncertain due to a subsequent 2003 Eighth Circuit decision, which more nearly employs the same ERISA analysis used by the court of appeals below. Since the decisions of the Eighth Circuit are in flux, further review of this case by the Court is not warranted.

Finally, the court of appeals correctly held that the district court did not abuse its discretion and properly applied Fed. R. Civ. P. 60(b)(5) when it determined that it would rule on the merits of DLEG's motion to dissolve the injunction.

For these reasons, the Petition should be denied.

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[3] *California Division of Labor v. Dillingham,* 519 U.S. 316 (1997).

COUNTER-STATEMENT OF THE CASE

Facts and Proceedings

In 1991, the Michigan Legislature, seeking to assure safety at worksites, amended two provisions of the Michigan Electrical Administrative Act (MEAA)[4] that regulate apprenticeships. Those same two provisions are now challenged by the Petitioner. The first provision, referred to generally as the equivalency requirement, states:

> The department of labor shall issue a certificate of registration to a person seeking registration upon satisfactory proof of the persons' participation in a bona fide apprenticeship training program approved by the board. This program shall be equivalent to the requirements of those imposed by the United States department of labor bureau of apprenticeship and training, subject to subsection (3).[5]

The second provision, generally referred to as the ratio requirement, provides:

> Except as otherwise provided in subsection (4), the ratio of electrical journeymen or master electricians to registered apprentice electricians shall be on the basis of 1 electrical journeyman or master electrician to 1 registered apprentice electrician. The department of labor or an enforcing agency shall enforce the ratio on a jobsite basis.[6]

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[4] 1956 PA 271, Mich. Comp. Laws § 338.881 *et. seq.*

[5] Mich. Comp. Laws § 338.883e(2).

[6] Mich. Comp. Laws § 338.883e(3).

ABC argued that the ERISA preempted this State law and requested the district court to enjoin DLEG from implementing these provisions.

A. The District Court's 1992 Decision.

The district court granted ABC's request and issued a permanent injunction prohibiting DLEG from enforcing the two statutory provisions in question.[7] The district court held that the statutory provisions were invalidated by ERISA's preemption language, which states that the Act "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."[8]

The district court relied principally on two cases involving ERISA preemption: the decision of the United States Court of Appeals for the *Eighth Circuit in Boise Cascade Corporation v. Peterson,*[9] and this Court's decision in *Shaw v. Delta Air Lines, Incorporated.*[10] The district court maintained these cases demonstrate that: (1) ERISA's "preemption clause has a broad reach" and (2) "the operative language of the preemption clause is the phrase 'relate to.'"[11]

The district court determined that Michigan's "ratio requirement" established the manner in which Michigan employers must train and utilize apprentice electricians, in effect mandating a minimum benefit

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[7] *Associated Builders v. Perry,* 817 F. Supp. 49 (E.D. Mich. 1992).

[8] Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1144(a).

[9] *Boise Cascade Corporation v. Peterson,* 939 F.2d 632 (8th Cir. 1991).

[10] *Shaw v Delta Air Lines, Incorporated,* 463 U.S. 85 (1983).

[11] *Perry,* 817 F.Supp. at 51.

level, and therefore "related" to ABC's apprenticeship plans. The district court also found that Michigan's "equivalency requirement" similarly established minimum benefit levels and restricted employers' ability to establish the manner in which to train apprentices, and, thus, also "related to" ABC's apprenticeship programs.[12] DLEG did not appeal the district court's 1992 decision.

B. The District Court's 2007 decision.

On May 5, 2006, DLEG, joined by the National Electrical Contractor's Association (NECA), filed a Motion to Dissolve the Court's Injunction, pursuant to Fed. R. Civ. P. 60(b)(5). DLEG argued that the district court's 1992 decision was predicated on case law that had since been superseded by this Court's subsequent decisions.

The United States Magistrate for the district court recommended that DLEG's motion be denied as untimely under the federal court rules, and thus did not issue a recommendation regarding the underlying merits of the motion. After reviewing DLEG and NECA's objections to the Magistrate's Report, the district court found that the motion was timely under the court rules but declined to dissolve the injunction.

The district court correctly noted that the only time requirement for motions filed under Fed. R. Civ. P. 60(b)(5) was that they be filed within a "reasonable time" and that "reasonable time" depended on the circumstances of the case. Pet. App.30a. The district court then determined that "the elimination of the legal predicate on which the injunction was issued – if found –

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[12] *Perry*, 817 F.Supp. at 52.

would create an inequity." Pet. App. 32a. With regard to the merits, the district court held that the Michigan statutory provisions remained preempted by ERISA because it "does dictate the choices of ERISA plan administrators by setting unavoidable obligations." Pet. App. 38a.

C. The 2008 Decision of the United States Court of Appeals for the Sixth Circuit.

On September 16, 2008, the court of appeals for the Sixth Circuit issued its decision in this case. Pet. App. 1a-22a. The court of appeals agreed with the district court that DLEG had filed its motion in a timely manner. Additionally, the court of appeals held that under this Court's current analysis, ERISA does not preempt the challenged MEAA provisions and thus reversed the district court and dissolved the injunction.

REASONS FOR DENYING THE PETITION

ABC attempts to portray this case as one that presents a "disturbing trend" regarding some federal courts' interpretation of the ERISA preemption clause. But no such trend exists. The court of appeals, employing a method analysis now used in all other circuits, determined that ERISA did not preempt Michigan's statutes. This decision was a straightforward application of this Court's decisions in *Travelers* and *Dillingham*.

As the court of appeals noted, no dispute exists that regulation of apprentices and apprenticeship training programs is an area of traditional State regulation. Moreover, Congress gave no indication of any intent in enacting ERISA "to pre-empt state apprenticeship training standards." Pet. App. 2a.

The cases ABC cites in its effort to demonstrate the existence of a circuit split on the issue of ERISA preemption of State laws regulating apprentice and apprenticeship training plans actually reveals, contrary to ABC's claim, a general uniformity by the circuits on the subject. Indeed, the alleged conflict that ABC points to, if there is one, has existed for years with no discernable negative impact on ERISA jurisprudence.

Likewise, there is no circuit split on the issue of what circumstances must exist for a State to seek relief from the onus of an injunction over its regulatory statutes under Fed. R. Civ. P. 60(b)(5).

I. The Sixth Circuit's opinion that ERISA does not preempt two provisions of the Michigan law governing the training of apprentice electricians does not warrant further review by this Court.

ABC's fundamental claim is that any State law pertaining to any type of employee benefit listed in ERISA necessarily regulates an employee benefit plan and therefore must be preempted. As the court of appeals determined, this claim fails because it contravenes the objectives of ERISA and is contrary to decisions by this Court.

A. This Court has emphasized that there must be some limitations placed on federal preemption.

This Court has often spoken of the importance of maintaining balance between concepts of federal preemption and State's rights, to ensure that each is given its proper respect.

This Court specifically recognized this concern in the area of ERISA preemption. "Our analysis of this problem must be guided by respect for the separate spheres of governmental authority preserved in our federalist system."[13] "As we recently reiterated, '[preemption] of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons -- either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained."[14]

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[13] *Alessi v. Raybestos-Manhattan*, 451 U.S. 504 (1981).

[14] *Alessi*, 451 U.S. 522 (internal citations omitted).

B. This Court's ERISA preemption jurisprudence has evolved such that the District Court's 1992 injunction was no longer in conformity with this Court's holdings.

The controversy in this case flows from the fact that this Court's ERISA jurisprudence has undergone an analytical shift, beginning in 1995 and continuing to this day.

In 1992, when the injunction in this case was first entered, the governing analysis of the ERISA preemption clause was set forth in *Shaw*. This case stood for the general proposition that the ERISA preemption language was to be broadly construed, thereby creating a presumption in favor of preemption.

In 1995, ERISA's preemption jurisprudence underwent a considerable shift when this Court decided *Travelers*. This evolution continued in 1997, with the release of *Dillingham*. The consequence of these two decisions is that ERISA'a preemption language is no longer broadly construed.

1. In *Travelers*, this Court held that a proper analysis of ERISA preemption requires consideration of the objectives of ERISA and a respect for State laws involving historic police powers.

The *Travelers* case represented a shift in the Court's analytical framework in that it recognized that the ERISA preemption provision should not negate the Court's traditional views of preemption. *Travelers*

stressed that in areas of traditional State regulation, there was a presumption against preemption:

> [W]e have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of preemption with the starting presumption that Congress does not intend to supplant state law.
>
> * * *
>
> [W]here federal law is said to bar state action in fields of traditional state regulation, we have worked on the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[15]

This Court then explained that the key to ERISA preemption analysis was not to use an "uncritical literalism" but to look to the objectives of ERISA instead:

> [T]his still leaves us to question whether the surcharge laws have a "connection with" the ERISA plans and here an uncritical literalism is no more help than in trying to construe "relate to."
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> * * *
>
> For the same reasons that infinite relations cannot be the measure of pre-emption,

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[15] *Travelers*, 514 U.S. 645, 654-655, citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 230 (1947).

> neither can infinite connections. We simply must go beyond the unhelpful text and frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.[16]

Thus when resolving an ERISA preemption claim, this Court emphasized that "nothing in the language of the Act or in the context of its passage indicates that Congress chose to displace general health care regulation, which historically has been a matter of local concern."[17]

2. In *Dillingham*, this Court applied the *Travelers* standard to a case involving State substantive standards for apprenticeship training programs.

The next important step in the evolution of the ERISA preemption analysis and the most important in terms of apprenticeship regulation is *Dillingham*.

In *Dillingham*, Plaintiffs, who utilized apprentices in unapproved training programs, challenged a California statute alleging that it "relate[d] to" their apprenticeship program and was therefore preempted by ERISA. Reversing the lower courts, this Court held that the California prevailing wage statute *did not* "relate to" an ERISA plan. The Court began its analysis by explaining the two-step analysis under § 514(a): "Our efforts in applying the provision have yielded a two-part inquiry: a "law 'relate[s] to' a covered employee benefit

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[16] *Travelers*, 514 U.S. at 656.

[17] *Travelers*, 514 U.S. at 661.

plan for purposes of §514(a) 'if it [1] has a connection with or [2] reference to such a plan.'"[18]

This Court explained that the "reference to" analysis results in preemption "where a State's law acts immediately and exclusively upon ERISA plans. . . or where the existence of ERISA plans is essential to the law's operations. . . ."[19] This Court concluded that there was no "reference to" ERISA plans because an apprenticeship program could be maintained by a single employer and its costs could be paid out of an employer's general assets. This Court reasoned that since ERISA plans only include employee benefit plans funded through a separate fund, the California law was a law of general application and thus did not make "reference to" ERISA plans.

Next, this Court addressed the "connection to" standard. At the outset, this Court recognized that substantive apprentice standards were an area of traditional state regulation and therefore presumptively outside the scope of ERISA preemption:

> At the outset, we note that apprenticeship standards . . . have long been regulated by the States. . . . That the States traditionally regulated these areas would not alone immunize their efforts . . . *[T]he substantive standards to be applied to apprenticeship training programs are, however, quite remote from the areas with which ERISA is expressly concerned – "reporting, disclosure, fiduciary*

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[18] *Dillingham*, 519 U.S. at 324, quoting *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 129 (1992).

[19] *Dillingham*, 519 U.S. at 325.

> *responsibility, and the like." A reading of 514(a) resulting in the pre-emption of traditionally state-regulated substantive law in those areas where ERISA has nothing to say would be "unsettling." Given the paucity of indication in ERISA and its legislative history of any intent on the part of Congress to pre-empt state apprenticeship standards . . . we are reluctant to alter our ordinary "assumption that the historic police powers of the States were not to be superseded by the Federal Act."*[20]

This Court then analyzed the California statute using this presumption. This Court reviewed the contents of the law to determine (1) whether it involved an area of traditional state regulation and, if so (2) its impact on ERISA's principal areas of concern such as reporting, disclosure, and fiduciary responsibility. Utilizing that analysis, this Court recognized that substantive regulation of apprentice training by the states is both an area of traditional state authority and one which has no impact on ERISA's principal areas of concern. Therefore the subject matter is not an area of state law that Congress intended to preempt in ERISA. This Court concluded that the California statute did not have a "connection with" ERISA plans.

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[20] *Dillingham*, 519 U.S. at 330-331, citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230 (internal citations omitted; emphasis added).

C. The court of appeals' decision was correct.

Further review by this Court is unnecessary because the ruling below by the court of appeals was correct. This Court's decisions in *Travelers* and *Dillingham* has made clear that for any case involving potential ERISA preemption the following threshold question must be answered. Does the State law have a "reference to" or a "connection with" an ERISA plan?

The court of appeals below properly recognized that, for this case, the only real controversy presented was in regard to the "connection with" prong of the test. "[The parties] agree that the ratio and equivalency requirements do not have a "reference to" ERISA plans. Pet. App.11a-12a. With respect to the "connection with" prong, the court of appeals correctly applied *Dillingham's* "connection with" analysis for cases involving laws pertaining to apprentices. Pet. App. 12a-20a.

Applying these principles, the court of appeals held that Michigan's statutory provisions did not have an impermissible "connection with" an ERISA plan, for multiple reasons. The court of appeals correctly framed the issued noting that while "the Michigan rules plainly mandate something, the question is whether that something falls within the scope of issues that ERISA prohibits the States from regulating." Pet. App. 13a. Writing for the court, Sixth Circuit Judge Sutton then specified six things why the Michigan Rules are not prohibited by ERISA. Pet. App. 13a-19a.

First, because the regulations fall within traditional police powers there is the presumption that they fall outside ERISA's preemptive reach. Pet. App. 13a. Second, that "the policies underlying the ratio and equivalency rules – the safety of electrical apprentices

and appropriate standards of electrical apprenticeship – are quite 'remote from the areas with which ERISA is expressly concerned.'" Pet. App. 13a. Third, "the allegedly preempted laws concern substantive apprenticeship training standards, not matters directly related to fund." Pet. App. 14a. Fourth, that under Petitioner's theory "ERISA would prevent the States from regulating the safety of apprentices and standards of electrical apprenticeship, even though ERISA does not regulate these matters either." Pet. App. 14a. Fifth, that if Petitioner's claim was correct "ERISA might preempt all sorts of laws of general applicability that affect ERISA plans, a view that would preempt a slew of state laws regulating not just apprenticeship standards but also the medical profession, day care centers and the practice of law." Pet. App. 16a. The court of appeals further noted that:

> What makes [Petitioners] approach particularly odd is the freedom it would give employers to escape generally applicable state laws that have nothing to do with ERISA's concerns. [Pet. App. 17a.]

The Sixth and final factor in the court of appeals' analysis rejecting petitioner's claim of preemption was the court of appeals' conclusion that it was fully in line with the reasoning and analytical framework employed by other courts of appeal. Pet. App. 18a-19a.

The court of appeals' *Dillingham* analysis is supported by the fact that this Court has limited the enforcement of ERISA's preemption provision to cases where the State law "mandate" interferes with an area that Congress intended ERISA to control exclusively.

For example, in *Alessi*, this Court held that the New Jersey statute implicated a core concern: "ERISA permits integration of pension funds with other public income maintenance moneys for the purpose of calculating benefits . . . New Jersey's efforts to ban pension benefit offsets based on workers' compensation applies directly to this calculation technique."[21]

Similarly, in *Egelhoff v. Egelhoff,* this Court stated: "The statute . . . implicates an area of core ERISA concern. . . . In other words, unlike generally applicable laws regulating 'areas where ERISA has nothing to say,' which we have upheld notwithstanding their incidental effect on ERISA plans, this statute governs the payment of benefits, a central matter of plan administration."[22]

D. ABC's position would require this Court to return to the more expansive analysis of ERISA preemption utilized prior to *Travelers* and *Dillingham.*

ABC's framing of the argument ignores this Court's shift away from the strict construction of the ERISA preemption language. ABC would ask this Court to preempt any state law that contains a mandate, without any inquiry as to the rationale or the subject matter of the mandate.

The preemption of the State statutes at issue here in the manner argued by ABC could lead to the wholesale preemption of nearly all laws of general application. Obviously, this would not be in keeping with this Court's previous statements regarding laws of

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[21] *Alessi,* 451 U.S. at 524.

[22] *Egelhoff v. Egelhoff,* 532 U.S. 141, 147-148 (2001)(internal citations omitted).

general application: "pre-emption does not occur if the state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability."[23] "Indeed, if ERISA were concerned with any state action – such as medical care quality standards or hospital workplace regulations – that increased costs of providing certain benefits, and thereby potentially affected the choices made by ERISA plans, we could scarcely see the end of ERISA's pre-emptive reach, and the words 'relate to' would limit nothing.[24] As the Eighth Circuit Court of Appeals noted, "[N]othing in ERISA attempts to preempt the entire field of health care or the regulation of professional standards for physicians."[25]

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[23] *Travelers*, 514 U.S. at 661 (internal quotation marks and alterations omitted).

[24] *Dillingham*, 519 U.S. at 329.

[25] *Shea v Esensten*, 208 F.3d 712, 719 (8th Cir. 2000).

II. The alleged conflict among the courts of appeals is insubstantial and uncertain and further review by this Court is not warranted.

A. The circuit decisions cited by ABC demonstrate a general uniformity on the issue of ERISA preemption of State laws regulating apprentices and apprentice training standards.

ABC argues that there is a split among the circuits regarding this issue. However, ABC review of these cases is fundamentally flawed since they are analyzed solely in terms of whether there is a "mandate" or "no mandate." But the correct analytical framework for assessing these cases is decidedly more detailed. This approach was accurately reflected in the court of appeals' analysis below, which faithfully adhered to this Court's holdings in *Dillingham* and *Travelers*.

The first inquiry must be whether the state law "relates to" an ERISA plan. If the answer is no, the next inquiry is whether the state law has a "connection with" an ERISA plan. The court of appeals identified this step, saying:

> "the 'connection with' inquiry thus requires two showings to preempt a state law: (1) the law at issue must mandate or effectively mandate something, and (2) that mandate must fall within the area that Congress intended ERISA to control exclusively. *Cf. Dillingham*, 519 U.S. at 325 (looking 'both to the objectives of the ERISA statute' and to the *'nature* of the effect of the state law on ERISA plans"). [Pet. App. 11a (emphasis added and internal quotation marks omitted).]

When viewed through this framework, the cases cited by ABC do not support the claim that there is a split among the circuits. ABC admits, as it must, that the Sixth Circuit's decision in this case is consistent with the Tenth Circuit's decision in *Wilmar Electrical Service v. Cooke*,[26] and the Eighth Circuit's decision in *Wright Electric Inc. v. Minnesota State Board of Electricity.* [27] Pet. Br. pp 21-24.

All three cases fall within the *Dillingham/Travelers* framework in that they involve State laws that: (1) have no "reference to" ERISA plans; (2) regard State apprenticeship training standards, an area of traditional state regulation, thus qualifying for the presumption against ERISA preemption; and (3) mandate health and safety regulations, which is a subject matter outside the areas that Congress intended ERISA to control exclusively. Accordingly, in all three cases, the courts found no ERISA preemption.

ABC cites four cases that it claims are in conflict with the cases cited above. The difficulty, for ABC, is that three of the four cases also fall within the *Dillingham/Travelers* framework: *Ferguson Electric Co. v. Foley*;[28] *ABC of Southern California v. Nunn*;[29] and *Oregon Columbia Brick Mason's Joint Apprenticeship Training Committee v. Gardner.*[30] Pet. Br. pp 19-20.

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[26] *Wilmar Electrical Service v. Cooke*, 212 F.3d 533 (10th Cir. 2000).

[27] *Wright Electric Inc. v. Minnesota State Board of Electricity*, 322 F.3d 1025 (8th Cir. 2003).

[28] *Ferguson Electric Co. v Foley*, 115 F.3d 237 (3d Cir. 1997).

[29] *ABC of Southern California v. Nunn*, 356 F.3d 979 (9th Cir. 2004).

[30] *Oregon Columbia Brick Mason's Joint Apprenticeship Training Committee v. Gardner*, 448 F.3d 1082 (9th Cir. 2006).

These three cases fall within the *Dillingham/Travelers* framework because they all involve State laws that: (1) have no "reference to" ERISA plans; (2) regard not State apprenticeship training standards, but the "state prevailing wage laws that incorporate them" *Dillingham*, 519 U.S. at 331, which also qualifies for the presumption against ERISA preemption; and (3) contain no mandate, as the statutes allowed for reasonable alternatives. Accordingly, in all three of these cases, the courts determined that there was no ERISA preemption.

Thus, when viewed under the proper framework, all six of the cited cases demonstrate a general uniformity on the issue of ERISA preemption that is consistent with this Court's holding in *Dillingham/Travelers*. In short, there is no indication of any widespread confusion or lack of uniformity in the Federal system with regard to the application of ERISA's preemption provision in the context of state laws that regulate apprentices. This case does not present the "compelling reasons" required by Supreme Court Rule 10 for grant of certiorari.

B. Even if a circuit conflict exists on this issue, this case presents a poor vehicle for resolution.

The sole case cited by ABC that might support a claim of conflict with the issue in this case is the Eighth Circuit's decision in *Minnesota Chapter of Associated Builders and Contractors, Incorporated v. Minnesota Department of Labor and Industry* ("*Minn ABC*").[31]

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[31] *Minnesota Chapter of Associated Builders and Contractors, Incorporated v. Minnesota Department of Labor and Industry*, 267 F.3d 807 (8th Cir. 2001).

But any conflict with the Eighth Circuit's decision in *Minn ABC* is, at best, insubstantial for several reasons. First, *Minn ABC* is wrongly decided. Second, *Minn ABC* was decided prior to the Eighth Circuit's subsequent decision in *Wright Electric,* which correctly applied this Court's ERISA preemption analysis. This calls into question whether the Eighth Circuit would decide *Minn ABC* the same way if it heard the case today. In any event since the decisions of the Eighth Circuit – and more specifically the manner in which ERISA preemption questions are analyzed– are in flux, further review of this case by the Court is not warranted. Finally, because the statute involved in *Minn ABC* is factually distinguishable from the Michigan provisions, such a fact bound case does not make a good vehicle for review.

1. *Minn ABC* was wrongly decided.

In *Minn ABC,* the Eighth Circuit, like ABC here, relied almost exclusively upon the presence of "mandates." Instead of focusing on the type of mandates involved, the court simply determined that because the Minnesota law contained mandates ERISA preempted these laws. The panel in *Minn ABC* also focused its analysis on the fact that the Minnesota statutes would act to prevent some types of training. As best stated by the court of appeals below: "state laws that prevent electrical contractors from providing some forms of apprenticeship training address matters that 'are quite remote from the areas with which ERISA is expressly concerned.'" Pet. App. 20a (citing *Dillingham,* 519 U.S. at 330).

Further, in *Minn ABC,* which was a split decision, the majority simply failed to faithfully adhere to this Court's analysis in Dillingham. This point was

underscored by the dissenting opinion that found the Minnesota law analogous to the Colorado law that was upheld by the Tenth Circuit in *Willmar*:

> I find the Tenth Circuit's logic and reasoning in *Willmar* persuasive, and disagree with the majority's attempt to distinguish it on the grounds that Minnesota's law actually prevents apprentice training. The substantive safety standards in Minnesota's statute and regulations are perhaps more comprehensive that the Colorado law set out in *Willmar*, but that is a difference in degree, not in kind. Both sets of laws have the same effect on ERISA plans; both indirectly increase the cost of apprentice training in order to comply with substantive safety standards set by the state, but neither 'mandates nor limits the granting of benefits to employees. [citing *Willmar*, 212 F.3d at 538] Likewise, both function as laws of general applicability, indiscriminately requiring safety standards for ERISA and non-ERISA apprenticeship training programs alike.[32]

Thus, from the date *Minn ABC* was issued, there was already a question about whether the Eighth Circuit applied the correct analytical framework under this Court's ERISA analysis, as set forth in *Travelers* and *Dillingham*.

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[32] *Minn ABC*, 267 F.3d at 821.

2. The Eighth Circuit decided *Minn ABC* prior to its decision in *Wright Electric*.

The question whether the Eighth Circuit had used the correct analytical framework in its 2001 decision in *Minn ABC* became more pronounced less than two years after it was decided. This is because in 2003 the Eighth Circuit was presented with an analogous case involving ERISA preemption and apprenticeship standards, yet concluded there was no preemption. In *Wright Electric*, the court held that "the supervision ratio statute was 'outside the area of ERISA's concerns, i.e. reporting, disclosure and fiduciary requirements put in place to protect employee's benefits."[33]

In *Wright Electric*, in an unanimous decision the Eighth Circuit recognized several legal concepts that eluded the majority of the panel in *Minn ABC*. First, it held that *Boise Cascade* was no longer controlling in light of this Court's decision in *Travelers*, and second, it recognized this Court's shift away from "strict textualism" in ERISA preemption cases.[34] Lastly, it recognized that a statute regulating apprentice supervision was outside of the area of ERISA's concerns.[35]

As a result, the nature and extent of any conflict with the Eighth Circuit and its decision in *Minn ABC* is uncertain given the Circuit's subsequent decision in *Wright Electric*, which employs the same ERISA analysis used by the court of appeals below. In short, the

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[33] *Wright Electric*, 322 F.3d 1025, 1032, citing *Wilmar*, 212 F.3d at 538.

[34] *Wright Electric*, 322 F.3d at 1029.

[35] *Wright Electric*, 322 F.3d at 1032.

perpetuation of any conflict caused by *Minn ABC* is called into question by *Wright Electric*, which raises the issue whether the Eighth Circuit would reconsider the propriety of its decision in *Minn ABC* if that case were re-presented today. Because the Eighth Circuit's jurisprudence on this question is in flux any conclusion that there exists a direct conflict warranting this Court's review is mistaken. If there is a conflict, it is an insubstantial one. Moreover, given the unresolved differences in these Eighth Circuit decisions, the exact nature of a conflict is not fully defined. Hence any further review by this Court would be premature.

3. The Minnesota statute in *Minn ABC* is factually distinguishable from Michigan's statute.

The factual differences between this case and *Minn ABC* also make this case a poor vehicle for resolving a circuit conflict, if one exists.

Unlike Michigan's equivalency provision, which creates no standards of its own, but simply requires approval under federally equivalent standards, the Minnesota statute in *Minn ABC* required approval under exclusively State created rules which "set out in very specific detail the length of an apprenticeship program, responsibilities of an apprentice, how an apprentice should be supervised, schedule of work processes, wage schedules, the amount of hours of related instruction required and the hours of work required."[36]

These distinctions are important, because to properly evaluate the Minnesota statute for the purpose

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[36] *Minn ABC*, 267 F.3d at 814.

of ERISA preemption, *each* requirement has to be reviewed separately to determine if it mandates an area intended to be vacated by ERISA.

Furthermore, ABC's position that Michigan's statutory provisions present impermissible "mandates" whereas the federal requirements emanating from the Fitzgerald Act[37] are voluntary, Pet. App. 12a, are of no import, as the "mandates" of the Michigan statutory provisions do not fall within the area that Congress intended ERISA to control exclusively.

[37] National Apprenticeship Act of 1937, 28 U.S.C. § 50.

III. The determination of the court of appeals that DLEG's motion to dissolve the injunction was timely does not warrant further review by this Court.

A. The court of appeals correctly held that the district court did not abuse its discretion.

The Sixth Circuit's determination that the district court did not abuse its discretion in determining that DLEG's Motion to Dissolve Injunction was timely was correct. The Sixth Circuit properly recognized that Fed. R. Civ. Proc. 60 includes a "reasonable time" provision. In determining that DLEG's motion was filed within a "reasonable time," both the District Court and the Sixth Circuit properly utilized the "flexible standard" announced by this Court in *Rufo v. Inmates of Suffolk County Jail.* [38]

In *Rufo*, this Court established a flexible standard for modification or termination of ongoing injunctions in cases involving "institutional reform." This Court indicated that under the new standard "a party seeking modification of a consent decree must establish that a significant change in facts or law warrants revision of the decree."[39] This Court based the new standard on recognition that old rigid standard was not consistent with principles of equity.

ABC's contention that *Rufo's* relaxed standard is limited to "institutional reform litigation" lacks merit. Several years after *Rufo*, this Court again referenced the "flexible standard" in reviewing 60(b)(5) motions. In *Agostini v. Felton*, this Court cited Rufo's standard generally without limiting it to "institutional reform"

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[38] *Rufo v Inmates of Suffolk County Jail*, 502 U.S. 367 (1992).

[39] *Rufo*, 502 U.S. at 393.

cases.[40] *Agostini* did not involve "institutional reform" but it did involve a matter of public interest – litigation involving a public school district. Since then, the general consensus among the courts has been that the "flexible standard" requires some level of public interest.

Litigation involving federal preemption of two provisions of the MEAA plainly involves a public interest. The MEAA is a prime example of the State's effort to protect its citizens pursuant to the State's constitutional powers. Like institutional reform litigation, this Supremacy Clause litigation "reach[es] beyond the parties involved directly in the suit"[41] and affects the Michigan Legislature that enacted the two statutory provisions, the governor that approved the legislation, and the People of the State.

The only remaining question was whether there has been significant changes in the law since the entry of the district court's 1992 Injunction. Here, the court of appeals cited to this Court's analysis in *DeBuono v. NYSA-ILA Medical and Clinical Services Fund*,[42] in support of its finding that a change in law had occurred: "the Supreme Court itself acknowledged differences between the Court's 'earlier ERISA pre-emption cases' and its cases since New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co., 514 U.S. 645 (1995)." Pet. App. 5a.

The court of appeals properly applied these factors and correctly held that DLEG timely filed its motion to dissolve the 1992 injunction.

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[40] *Agostini v. Felton*, 521 U.S. 203 (1997).

[41] *Rufo*, 502 U.S. at 381.

[42] *DeBuono v. NYSA-ILA Medical and Clinical Services Fund*, 520 U.S. 806 (1997).

B. There is no significant split among the circuits regarding the application of *Rufo's* "flexible standard."

ABC argues that a circuit split exists regarding application of the *Rufo* standard. ABC properly indicates that the courts in the following cases did not hesitate to extend *Rufo's* standard beyond cases of "institutional reform" from the second, seventh, and ninth circuits: *Patterson v. Newspaper Mail Deliverers' Union of New York*;[43] *In re Hendrix*;[44] *Bellevue Manor Associates v. United States*;[45] and the court of appeals decision, below. Pet. App. 34a-35a.

In attempting to create the appearance of a circuit split, ABC argues that several circuits have refused to apply the *Rufo* standard to cases not involving institutional reform. A closer analysis of those cases, however, reveals that the cases do not support a conflict among the circuits.

First, none of the cases cited by ABC concern a permanent injunction striking down a State law of general application based on legal authority that no longer exists. ABC cannot refute this point – because no such case law exists.

Second, ABC cites two cases as examples of circuits refusing to extend the *Rufo* standard beyond cases of institutional reform. Yet, ABC pointedly ignores that neither case deals with an issue of public interest. As such, they are easily distinguishable from the list of

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[43] *Patterson v. Newspaper Mail Deliverers' Union of New York*, 13 F.3d 33, 38 (2d Cir. 1993).

[44] *In re Hendrix*, 986 F.2d 195, 198 (7th Cir. 1993).

[45] *Bellevue Manor Associates v. United States*, 165 F.3d 1249, 1255 (9th Cir. 1999).

cases which indicate that the *Rufo* flexible standard can and should be extended to cases involving the public interest.

Paul Revere Variable Annuity Ins. Co. v. Zang and Beck from the first circuit dealt with an arbitration agreement between private parties. [46] The court indicated that: "The order here resolved a contractual dispute between private parties with *tenuous and tangential bearing at best on the public interest.*"[47]

Similarly, the federal circuit court of appeals in *W.L. Gore & Associates, Inc. v. C.R. Bard, Inc.* dealt with a private commercial dispute: "The institutional reform cases present considerations not found in consent decrees settling commercial disputes . . . . [C]ommercial litigants . . . have negotiated a voluntary contract that has simply been accepted by the court in termination of litigation."[48]

Like the ERISA preemption issue discussed above, there is no indication of any widespread confusion or lack of uniformity in the federal courts with regard to the application of *Rufo's* flexible standard in cases involving a matter of public interest. This case does not present the "compelling reasons" required by Supreme Court Rule 10 for grant of certiorari.

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[46] *Paul Revere Variable Annuity Ins. Co. v. Zang and Beck*, 248 F.3d 1, 7 (1st Cir. 2001).

[47] *Revere*, 248 F.3d at 7 (emphasis added).

[48] *W.L. Gore & Associates, Inc. v. C.R. Bard, Inc.*, 977 F.2d 558, 562 (Fed. Cir. 1992).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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